SUBJECT INDEX.

PAGE

Motion for rehearing 1

Suggestions in support of motion for rehearing 5

I. M. K. & T. Ry. Co. v. Wulf, 226 U. S. 570, conflicts with the per curiam opinion in this Court 5

II. The only applicable remedial law in this case consists of the Federal Rights Acts 12

III. The Civil Rights Acts authorized Mrs. Moffett to institute the action in each and every capacity in which she was injured and deprived of her Constitutional rights 26

IV. The Missouri statutes could not operate to deprive Mrs. Moffett of the remedial rights given by the Federal Civil Rights Acts 35

V. The Missouri judgment affecting Mrs. Moffett in either capacity would bind her as to both 40

VI. Failure to apply Rule 29 of the trial court (402-403) deprived Mrs. Moffett of the rights secured by Section 1 of the XIVTH Amendment 42

VII. The decision of the state court sought to be reviewed was not based on a non-Federal ground adequate to support it because:

1st. The Civil Rights Acts provided an exclusive remedy and authorized Mrs. Moffett to sue in both capacities 50

2nd. A demurrer on the ground of misjoinder of parties plaintiff was not allowed by the state law 50

Conclusion 59

PAGE

Exhibit "A"—Verdict for Sallie C. Wulf, against M. K. & T. Railway Company 62

Cases Cited.

A.

American Ry. Exp. Co. v. Levee, 263 U. S. 19, 20, 21 27
Ancient Arabic Order N. M. S. v. Michaux, 279 U. S. 737, 744-745 45
Armour v. Roberts, 151 Fed. 846 59

B.

Bates v. Relyea, 23 Wend. (N. Y.) 336, 340 10
Baltimore & Ohio S. W. R. Co. v. Carroll, 280 U. S. 491, 495 31
Blackstone's Commentaries, Vol. 1, p. 69 11
Beattie Mfg. Co. v. Gerardi, 166 Mo. 142, 153, 155 55
Bell et al. v. Hood et al., 90 Law Ed. 758 ..... 14, 20
Burt v. City of New York, 156 Fed. (2d) 791 (C. C. A. 2) 3, 23, 35, 36, 37
Baltimore & O. R. Co. v. Kepner, 314 U. S. 44, 52 59
Butler v. Lawson, 72 Mo. 227 59

C.

Coe v. Armour Fertilizer Works, 237 U. S. 413 46
Cohens v. Virginia, 6 Wheat. 264, 379, 404 ..... 14, 59, 61
Chapman v. Goodnow's Adm'r, 123 U. S. 540, 548 15
Cooley's Constitutional Limitations, page 49 11
C. & O. Ry. Co. v. Kuhn, 284 U. S. 44 19
Cummings v. Missouri, 4 Wall. 277 52

D.

Davis v. Weschler, 263 U. S. 22, 24 28
Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282, 290 45
Drakopulos v. Biddle, 288 Mo. 424, 433 8
Dorchy v. Kansas, 272 U. S. 306, 308 15

BLEED THROUGH- POOR COPY

PAGE

E.

Equitable Life Assur. Soc. v. Brown, 187 U. S. 308, 311 ..... 18, 34
Ex parte Carey, 306 Mo. 287, 294 ..... 54, 57
Eliot v. Railroad, 204 Mo. 1, 12-13 50

F.

Flournoy v. Wiener, 321 U. S. 253, 261-262, 274 23
First National Bank v. Anderson, 269 U. S. 341, 346 17

G.

Georgia Ry. & Elec. Co. v. City of Decatur, 295 U. S. 165, 170 57
Georgia v. Pennsylvania R. Co., 324 U. S. 439 20

H.

Holmberg v. Armbrecht, 90 Law Ed. 590 19
Hendon v. Kern, 351 Mo. 980 59
Hotchkiss v. Ogle, 153 Kan. 156, l. c. 162 58

I.

In re Thomasson's Estate, 196 S. W. (2d) 155 40
In Fouche, Assignee, et al. v. Harrison et al., 78 Ga. 359, 410 41
Irrigation Co. v. Gildersleeve, 174 U. S. 603, 608-609 .. 3, 42

J.

Jumping Frog of Calaveras County, by Mark Twain, Jessup's Ed. World's Best Books, pp. 102, 106-107 .. 50

K.

1 Kent's Commentaries, p. 475 11
Kansas City Public Service Co. v. Ranson, 328 Mo. 524, 536 57

L.

Lawrence v. State Tax Commission of Mississippi, 286 U. S. 276, 282 15

M.

Magwire v. Tyler, 17 Wall. 253, 286 ..... 7, 51, 59
Magwire v. Tyler, 47 Mo., l. c. 125-126 52

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PAGE

M. K. & T. Ry. Co. v. Wulf, 226 U. S. 570 ..... 2, 5, 33
Missouri ex rel. Taylor, 266 U. S. 200, 208, 209 ..... 15, 27
Meierhoffer v. Hansel, 294 Mo. 195, 202, 206 ..... 3, 42, 43
Murdock v. Memphis, 20 Wall. 590, 635 23
Miller v. Union Pacific R. Co., 290 U. S. 227 59

N.

New York Central R. Co. v. Kinney, 260 U. S. 340, 345 9
New York Central R. Co. v. Winfield, 244 U S. 147 27

O.

Osborn v. Bank of United States, 9 Wheat. 738 14

P.

Pollock's (Sir Frederick) First Book of Jurisprudence, p. 338 11
Pomeroy on Code Remedies, 5th Ed., p. 214, note 89 58
Paul v. Virginia, 8 Wall. 168 30
Picking et al. v. Pennsylvania R. Co. et al., 151 Fed. (2d) 240 (C. C. A. 3) 3, 20, 23, 35
Prigg v. Pennsylvania, 16 Pet. 539 27
Purdy v. Pfaff, 104 Mo. App. 331, 339 55
Pryor v. Williams, 254 U. S. 43 19
Parker v. Simpson, 180 Mass. 334, Syl. 2 and 9 58

R.

Robertson & Kirkham's Jurisprudence of the Supreme Court of the United States, p. 109 14
Rossi v. Davis, 345 Mo. 362, 383 ..... 40, 41
Rio Grande Irrigation Co. v. Gildersleeve, 174 U. S. 603, 608-609 42

S.

Sanders v. St. Louis & N. O. Anchor Line, 97 Mo. 26, 30-31 57
Scott v. Donald, 165 U. S. 58 34
Screws v. United States, 325 U. S. 91 36
Smith v. Allwright, 321 U. S. 649, 669 10
State ex rel. v. Pedigo, 181 S. W. 987, 988 47
Smyth v. Ames, 169 U. S. 466 25

BLEED THROUGH— POOR COPY

PAGE

Snowden v. Hughes, 321 U. S. 1 37
St. Louis, I. Mtn. & S. Ry. Co. v. Craft, 237 U. S. 648, 658 30
Sutherland on Statutory Construction, 2d Ed. Sec. 402 57
Swafford v. Templeton, 185 U. S. 487, 493 ..... 17, 18, 34

T.

Truax v. Corrigan, 257 U. S. 312 14

U.

United States v. Classic, 313 U. S. 299 36
United States v. Fisk, 3 Wall. 444, 447 30

W.

Williams on Executors, Vol. II, p. 77 8
White v. Pulley, 27 Fed. 436 8
Wiley v. Sinkler, 179 U. S. 58 17

Statutes Cited.

XIVTH Amendment United States Constitution, Section 1 ..... 3, 13, 14
Section 43 Title 8 U. S. C. 8, 26, 29, 34, 35
Section 47 Title 8 U. S. C. 8, 32, 34
Civil Rights Acts 9, 12, 16, 17, 19, 21, 25, 35
Employers Liability Act 26, 34
Section 1979 R. S. U. S. 35, 36
Section 922 R. S. Mo. 1939 ..... 51, 55, 56
Section 948 R. S. Mo. 1939 44
Section 652 R. S. Mo. 1939 19
Section 1 Title 1 U. S. C. 19

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In the Supreme Court of the United States

October Term 1946.

LOUISE MCGREW MOFFETT and LOUISE MCGREW MOFFETT as Executrix of the Estate of Thomas S. Moffett, Deceased, *Appellants,*

VS.

COMMERCE TRUST COMPANY, a Corporation, HELEN WEEDE, B. C. HOWARD and WILLIAM H. KOPP, *Appellees.*

MOTION FOR REHEARING AND SUGGESTIONS IN SUPPORT THEREOF.

No. 318.

MOTION FOR REHEARING.

Appellants respectfully pray for a reconsideration of the questions decided herein on October 14, 1946, and that the Court hold for naught its order heretofore entered herein, and ask that said cause be then docketed and set

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down for hearing upon its merits, and as grounds therefor appellants state:

I.

This Court, in *M. K. & T. Ry. Co.* v. *Wulf*, 226 U. S. 570, affirmed the decisions of the lower courts permitting Mrs. Wulf to sue in the same capacities in which Mrs. Moffett was denied the right to sue herein, on a cause created by a Federal Law, as is Mrs. Moffett's case, and the conflict between the decisions in both cases necessitates a rehearing.

(See pp. 5-12 of Suggestions in Support of this Motion.)

II.

The only applicable remedial law in this case consists of the Federal Civil Rights Acts, which were themselves remedies provided by Congress to enforce the Civil War Amendments, which Federal remedies covered the entire field to the exclusion of all state remedial laws, and which Federal remedies were available to Mrs. Moffett, by their terms, to recover the damages caused by appellees' violation of her rights under said amendments and said Civil Rights Acts, which Acts constitute the supreme law in this case.

(See pp. 12-26 of Suggestions in Support of this Motion.)

III.

The Civil Rights Acts authorized Mrs. Moffett to bring the action in each and every capacity in which she was injured and damaged. And the action of the state court in dismissing the case on the ground of misjoinder of parties plaintiff, and of this Court in dismissing the appeal

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herein, deprived Mrs. Moffett of the Federal rights given to her by said Acts.

(See pp. 26-35 of Suggestions in Support of this Motion.)

IV.

Burt v. *City of New York et al.*, 156 Fed. (2d) 791 (C. C. A. 2), and *Picking et al* v. *Pennsylvania R. Co. et al.*, 151 Fed. (2d) 240 (C. C. A. 3), construe and apply Sections 43 and 47, Title 8 U. S. C. A., holding that under the decisions of this Court said statutes are valid, and that statutes of a state cannot operate to deprive Mrs. Moffett of the rights given by the Federal Statutes.

(See pp. 35-39 of Suggestions in Support of this Motion.)

V.

Had Mrs. Moffett instituted this action in one capacity to the exclusion of the other, the decision of the Missouri court for or against her would have prevented another action in the other capacity, and so she was entitled, as against a demurrer on the non-demurrable ground of misjoinder of parties plaintiff, to recover in the state court in both capacities.

(See pp. 40-41 of Suggestions in Support of this Motion.)

VI.

Rule 29 of the trial court was the law of the court (*Irrigation Co.*, v. *Gildersleeve*, 174 U. S. 603, l. c. 608-609, *Meierhoffer* v. *Hansel*, 294 Mo. 195) binding parties, judge and court, and failure to obey it deprived Mrs. Moffett of the Federal rights secured by Section 1 of the XIVth Amendment.

(See pp. 42-50 of Suggestions in Support of this Motion.)

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VII.

The decision of the state court sought to be reviewed was not based on a non-Federal ground adequate to support it because:

1st. The Civil Rights Acts provided an exclusive remedy and authorized Mrs. Moffett to sue in both capacities.

2nd. A demurrer on the ground of misjoinder of parties plaintiff was not allowed by the state law.

(See pp. 50-61 of Suggestions in Support of this Motion.)

A. E. WATSON,
MARTIN J. O'DONNELL,
Attorneys for Appellants.

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SUGGESTIONS IN SUPPORT OF MOTION FOR REHEARING.

I.

This Court, in *M. K. & T. Ry. Co.* v. *Wulf*, 226 U. S. 570, affirmed the decisions of the lower courts permitting Mrs. Wulf to sue in the same capacities in which Mrs. Moffett was denied the right to sue herein, on a cause of action created by a Federal law, as is Mrs. Moffett's case, and the conflict between the decisions in both cases necessitates a rehearing.

The per curiam opinion and decision herein is in conflict with the opinion and decision of this Court in *M. K. & T. Ry. Co.* v. *Wulf*, 226 U. S. 570. In that case Mrs. Wulf, by an amendment as here, sued in two capacities, as here, and recovered a judgment as an individual and as administratrix of the estate, in a Federally created cause of action of which Mrs. Wulf was the sole beneficiary, as was Mrs. Moffett herein (155). The judgment rendered in the trial court, and affirmed by this Court and by the Circuit Court of Appeals (192 Fed. 919) (C. C. A. 5) in the Wulf case is as follows:

> "It is therefore considered by the court and so ordered, adjudged and decreed, *that the plaintiff, Sallie C. Wulf, in her individual capacity and as administratrix* of the estate of Fred S. Wulf, deceased, do have and recover of the defendant, the Missouri, Kansas & Texas Railway Company, a corporation, the sum of seven thousand ($7,000.00) dollars, with interest thereon at the rate of 6 per cent per annum from this date, and all costs of suit for which let execution issue."

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Said judgment is shown by the certified copy thereof marked Exhibit "A" and hereto attached; and is also shown in the records of the Wulf case in this Court, No. 517, October Term 1912.

There defendant before, at and after the trial, raised the same objections as to misjoinder of parties plaintiff as appellees herein raised to Mrs. Moffett's capacities herein. The record in that case preserved the question 1st, by the motion to elect; 2nd, by the motion for a new trial; and 3rd, by assignment of error in the Circuit Court of Appeals, thus:

> "X. The court erred in overruling defendant's motion to require plaintiff to elect whether she would prosecute this suit in her own right or as administratrix."

On writ of error to this Court, it specifically approved the actions of the trial court in permitting the amendment adding Mrs. Wulf as administratrix, and of the court of appeals (192 Fed. 919) (C. C. A. 5) in affirming said judgment of the trial court, and thereupon affirmed said judgment. In its opinion the following appears in the language of Mr. Justice Pitney, l. c. 572:

> "* * * plaintiff is the sole heir, next of kin, and beneficiary of the estate of the said Fred S. Wulf deceased."

At l. c. 273:

> "* * * plaintiff filed her first amended original petition averring that she was the sole heir and next of kin of Fred S. Wulf, deceased; * * * 'there now exists no necessity for an administration * * * unless the same should be necessary for the sole purpose of prosecuting this suit * * * said plaintiff being the next of kin and sole beneficiary of whatever may

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> be recovered in this suit. She therefore sues in her original capacity as such sole beneficiary and next of kin; but in the event it shall be determined that she is not entitled to recover in said capacity, then she asks that she be allowed to recover as administratrix for her benefit as aforesaid. Therefore *she sues both in her individual capacity and as administratrix,* as aforesaid.' "

At l. c. 574:

> "This amendment was allowed by the court, and an order was made permitting the plaintiff to prosecute *as the personal representative of the deceased for her individual benefit, as well as in her individual capacity.*"

The decision of this Court in the Wulf case was wholly based on the exact point involved in this case, and no other, in permitting Mrs. Wulf to proceed in both capacities. The opinion says, l. c. 575 and 576:

> "The argument for reversal rests wholly upon the mode of procedure followed in the circuit court. • • •
> "The change was in form rather than in substance. (*Stewart* v. *Baltimore & O. Ry. Co.* 168 U. S. 445, 42 L. ed. 537, 18 Sup. Ct. Rep. 105.)"

This Court, in *Magwire* v. *Tyler,* 17 Wall. 253, l. c. 286, construing the Missouri demurrer statute, said:

> "A demurrer for want of form is not allowed; nor is the jurisdiction of the court in any way affected by forms."

This Court's opinion in the Wulf case, *supra,* finds support and analogy in the rule which authorizes an executor to appear individually or as executor, when a plaintiff, *in any tort action for damages.*

In Williams on Executors, Vol. II, p. 77 *et seq.*, it is said:

> "Upon the death of the testator or intestate, if any injury is afterward done to the goods or chattels, the executor or administrator may bring an action for damages for the tort. And, under such circumstances, he has the option, either to sue in his representative capacity, and declare as executor or administrator, or to bring the action in his own name, and in his individual character."
>
> "This right of action, and option as to the form in which it should be brought, exists in the executor or administrator, whether he has ever had actual possession of the property or not."

The form of the action in tort, both at common law and under modern rules, does not prevent whatever judgment is rendered from binding the plaintiff in both capacities.

See also *White* v. *Pulley*, 27 Fed. 436, citing Williams on Executors, and approving the joinder of an individual who was also administrator.

The principles applied by this Court in the Wulf case, *supra*, have been incorporated into the law of Missouri by the decisions of the Supreme Court of Missouri.

Appellants' brief, on page 86, refers to *Drakopulos* v. *Biddle*, 288 Mo. 424, wherein the trial court struck out a fifth amended petition. The State Supreme Court reversed the trial court and held that, l. c. 433:

> "The only concern of defendants as to parties plaintiff is that whoever prosecutes the action shall be competent to maintain it in such a way as to bar any other action for the same injury."

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That court held that, as applied to that tort action, this Court correctly declared the applicable law in the Wulf case. Thus:

> "We are further fortified in the view we take of the amendment in this case by the opinion of Mr. Justice Pitney of the United States Supreme Court in *M. K. & T. Ry. Co.* v. *Wulf*, 226 U. S. 570. In that case the action had been instituted by the mother of the deceased, as his sole heir, and subsequently she was appointed administratrix and was made a party plaintiff."

In *New York Central & H. R. Co.* v. *Kinney*, 260 U. S. 340, this Court recognized the right of a plaintiff to sue in both capacities in a tort action under an act of Congress, and followed the holding in the Wulf case on that point, saying, l. c. 345:

> "In *Missouri, K. & T. R. Co.* v. *Wulf*, 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914B, 134, the declaration was by the mother as sole heir and next of kin of an employee of the plaintiff in error, in terms referring to a statute of Kansas giving her a right of action for injuries resulting in death. An amendment was allowed, more than two years after the injury, in which the plaintiff declared *both as sole beneficiary and next of kin and as administratrix*, and relied both on the Kansas law and on the act of Congress."

Mrs. Moffett exercised her option as to the form in which the action should be prosecuted, in accordance with the principles stated by Williams on Executors and by this Court in the Wulf case. She also strictly complied with the provisions of the Civil Rights Acts on that question. The Wulf case was decided in 1913, and for the last

33 years it has served as a precedent and a guide to the judges of this and other courts, as shown by the great number of times (more than 500) it has been cited in Shepard's Digest. Said decision is, therefore, a controlling precedent which this Court should follow herein, unless it adheres to the rule attributed to it by Mr. Justice Roberts, in *Smith* v. *Allwright*, 321 U. S. 649, l. c. 669:

> "The reason for my concern is that the instant decision, overruling that announced about nine years ago, tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only."

The reasons which moved this Court in that case to overrule the decision there involved, and which occasioned said statement by Mr. Justice Roberts, cannot apply here, for the general rule as to the authority of precedents applies to the precedent made by this Court in the Wulf case, and should compel its application to this case, and result in granting the motion for rehearing, and reversal. For this Court has ignored the decision in the Wulf case herein by dismissing the appeal, and thereby overruled it.

We reproduce some elementary authorities as to the duties of all courts, from the highest to the lowest, to follow judicial precedents. In *Bates* v. *Relyea*, 23 Wend. (N. Y.) 336, 340, it is said:

> "The court almost always, in deciding any question, creates a moral power above itself; and when the decision construes a statute, it is legally bound, for certain purposes, to follow it as a decree emanating from a paramount authority."

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In Blackstone, Commentaries, Vol. 1, 69, the rule is stated:

> "* * * it is an established rule to abide by former precedents where the same points come again in litigation, as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion, as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from according to his private sentiments, he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one."

1 Kent's Commentaries, 475, say:

> "If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness, and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it."

Cooley's Constitutional Limitations, 49, say:

> "All judgments are supposed to apply the existing law to the facts of the case, and the reasons which are sufficient to influence the court to a particular conclusion in one case ought to be sufficient to bring it or any other court to the same conclusion in all other like cases where no modification of the law has intervened."

Sir Frederick Pollock's First Book of Jurisprudence, p. 338, contains the following:

> "For all practical purposes, it may be said that a rule of general law which has been laid down or approved, to substantially the same effect, in the House of Lords and in the Supreme Court of the United States, is the law of the English-speaking world, wherever it has not been excluded or varied by express legislation."

Why is not Mrs. Moffett entitled to the benefit of that rule in this case?

II.

The only applicable remedial law in this case consists of the Federal Civil Rights Acts, which were themselves remedies provided by Congress to enforce the Civil War amendments, which federal remedies covered the entire field to the exclusion of all state remedial laws, and which federal remedies were available to Mrs. Moffett, by their terms, to recover the damages caused by appellees' violation of her rights under said amendments and said Civil Rights Acts, which Acts constitute the supreme law in this case.

The decision dismissing the appeal is based on a purported but nonexisting rule of state law, thus:

> "*Per Curiam:* The motion to dismiss is granted, and the appeal is dismissed for the reason that the dicision of the state court sought here to be reviewed was based upon a non-Federal ground adequate to support it. *Enterprise Irrigation District* v. *Canal Co.*, 243 U. S. 157, 165; *Utley* v. *St. Petersburg*, 292 U. S. 106, 111."

Whereas, appellants' pleaded right to recover is based upon the provisions of the Constitution and of the Civil Rights Acts specified in the petition, because of the wrongful acts done by appellees under color of state law, in combination with officials exercising the powers of the

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states of Missouri and Kansas, to-wit, a Kansas district judge and Commerce Trust Company as alleged Missouri executor and administrator of estates. The pleading asserting these rights includes the following allegations, thus (225):

> "That the said defendants used the judicial power of the state of Kansas, through the said district judge, thus unlawfully and intentionally to deprive this plaintiff of her privileges and immunities as a citizen of the United States and of her property, contrary to the command of Section 1 of the XIVth Amendment to the Constitution of the United States, commanding that no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws; and that the said false document, Exhibit No. 8, was so used by the said defendants, with the knowledge, consent and sanction of the then judge of said District Court, to accomplish said purpose; and plaintiff was thereby denied the rights secured to her by the Constitution and laws of the United States, and especially by the said provisions of said XIVth Amendment to the Constitution of the United States, and by the provisions of Sections 51 and 52 of Title 18, United States Code, prohibiting all persons from using the authority of the state of Kansas in denying to plaintiff the rights secured to her and all other citizens by said United States Constitution and laws, and from conspiring to deprive her of such rights under said Constitution and laws; and the said defendants, by reason of the injury thus caused plaintiff, became liable to said plaintiff under and by virtue of Sections 43, 47 and 48, Title 8, United States Code, the protection of which Constitution and statutory provisions the plaintiff here and now invokes."

And also (287-288):

> "That the rights of said Thomas S. Moffett and of this plaintiff in and to the said property were violated by the defendants pursuant to the said conspiracy in causing plaintiff and her said husband to be denied the protection of Sections 43, 47 and 48, Title 8, and Sections 51 and 52, Title 18, United States Code, and of the protection of Section 1 of the XIVth Amendment to the United States Constitution. * * *"

A case in which the plaintiff founds his claim on the Federal Constitution, a federal statute, or a Treaty, is clearly one involving a federal question, since its decision turns on a proper application of one or the other, or all, of those forms of federal law.

Cohens v. *Virginia*, 6 Wheat. 264.
Osborn v. *Bank of United States*, 9 Wheat. 738.
Bell et al. v. *Hood et al.*, 90 Law Ed. 758.

The opinion of the state court does not discuss said allegations in terms. Nevertheless, it declares that it considered, and of course decided, all the assignments of error (820), which included the error of the court in denying to Mrs. Moffett her federal rights as above alleged. These questions are therefore as much before this Court as they were before the state Supreme Court (*Truax* v. *Corrigan*, 257 U. S. 312).

In Section 61, Robertson and Kirkham's Jurisdiction of the Supreme Court of the United States, page 109, it is said:

> "61. Express Decision of Federal Question by State Court Not Required.

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Actual decision of the federal question in terms by the state court is not required; it is sufficient that the federal question was fairly presented by the record, was necessary to a determination of the cause, and that no adequate nonfederal ground of decision appears. Federal rights are denied as well by a refusal of the state court to decide questions presented, as by an erroneous decision of them" (citing cases).

Chapman v. *Goodnow's Adm'r*, 123 U. S. 540, 548, 8 Sup. Ct. 211, 31 L. Ed. 235.
Bell's Gap R. Co. v. *Pennsylvania*, 134 U. S. 232, 236, 10 Sup. Ct. 533, 33 L. Ed. 892.
Chicago Life Ins. Co. v. *Needles*, 113 U. S. 574, 579, 5 S. Ct. 681, 28 L. Ed. 1084.
Erie R. Co. v. *Purdy*, 185 U. S. 148, 154, 22 S. Ct. 605, 46 L. Ed. 847.
Roby v. *Colehour*, 146 U. S. 153, 159, 160, 13 S. Ct. 47, 36 L. Ed. 922.
Dewey v. *City of Des Moines*, 173 U. S. 193, 199, 19 S. Ct. 379, 43 L. Ed. 665.
Dorchy v. *Kansas*, 272 U. S. 306, 308, 309, 47 S. Ct. 86, 71 L. Ed. 248.
Lawrence v. *State Tax Commission of Mississippi*, 286 U. S. 276, 282, 52 S. Ct. 556, 76 L. Ed. 1102, 87 A. L. R. 374.

Appellees attempted to find comfort in *Missouri ex rel.* v. *Taylor*, 266 U. S. 200 (see their printed statement opposing jurisdiction, p. 24). But that case holds directly against their contention.

They failed to call attention to the fact that the federal statute there involved *made no provision concerning the remedy*, and further specifically provided that it should *not change any remedy or right of action* under existing law. Thus:

"Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading *of any remedy* or *right of action* which he has under existing law."

The opinion in that case points out that Congress *did not provide a federal remedy,* saying, l. c. 208:

"It dealt solely with the substantive law • • • it made no provision concerning the remedy."

This Court then further said, l. c. 209:

"No peculiarity of state procedure will be permitted to enlarge or abridge a substantive federal right. *Central Vermont R. Co.* v. *White,* 238 U. S. 507, 511, 59 L. Ed. 1433, 1436, 35 Sup. Ct. Rep. 865, Ann. Cas. 1916B, 252, 9 N. C. C. A. 265; *Atlantic Coast Line R. Co.* v. *Burnette,* 239 U. S. 199, 60 L. Ed. 226, 36 Sup. Ct. Rep. 75, 17 N. C. C. A. 144; *New Orleans & N. E. R. Co.* v. *Harris,* 247 U. S. 367, 371, 62 L. Ed. 1167, 1170, 38 Sup. Ct. Rep. 535; *Yazoo & M. Valley R. Co.* v. *Mullins,* 249 U. S. 531, 63 L. Ed. 754, 39 Sup. Ct. Rep. 368. But to enforce a claim by subjecting property within the state to its satisfaction, through attachment proceedings, does not enlarge the substantive right."

The fact that Mrs. Moffett relied upon the Federal Constitution and Civil Rights Acts as the law authorizing the remedy which she sought is shown by the record in this case from the beginning. This appears from the foregoing allegations of her pleading, by assignments of error in the state court, and by the following from her jurisdictional statement, brief and all the motions and suggestions filed.

In appellants' jurisdictional statement (p. 3 printed copy) attention is called to the fact that appellants'

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pleading showed Mrs. Moffett's reliance on said statutes, and on page 5 thereof, after allegation as to denial of constitutional rights, it is stated that appellees instituted

> "• • • fictitious suits for $2,539,366.80 (268), intentionally kept pending since 1930 for the purpose of injuring appellants by depriving them of the rights secured to them by the Acts of Congress known as the Civil Rights Acts, R. S. 1979, 1980 and 1981" *et seq.*

On page 10 is the statement:

> "As the action in the state court was based on appellants' right to recover on Sections 1979, 1980 and 1981, U. S. R. S. (Secs. 43, 47 and 48, Title 8, U. S. C.), supplementing the constitutional provisions and Treaty, the question presented to the state court was necessarily a question of federal law within the rule stated in *First National Bank* v. *Anderson,* 269 U. S. 341, l. c. 346."

On page 11 it is said:

> "Denial of the rights guaranteed by Section 1 of the XIVth Amendment and R. S. 1979, 1980 and 1981, same being Sections 43, 47 and 48, Title 8, U. S. C. (225, 287-288), authorized appellants to institute the action at law in the state court to recover damages for the resulting loss (*Wiley* v. *Sinkler,* 179 U. S. 58; *Swafford* v. *Templeton,* 185 U. S. 487)."

In calling attention to the fact that the action was based on said Civil Rights Acts, it appears on page 14 that it is stated:

> " 'Such state statutes became as ineffective, both as to rights and *remedies,* as they would have been had they been specifically repealed by the state.' "

On pages 14-15 is the following:

> "This consideration as to the questions here involved brings this case within the class of controversies concerning rights created by the Constitution and laws of the United States, rather than those not created by the Constitution or laws of the United States, but which may or may not involve a federal question, as outlined in *Swafford* v. *Templeton, supra.*"

On page 15 it is said, after reference to *Equitable Life Assur. Soc.* v. *Brown*, 187 U. S. 308:

> "There this court stated the rule which applies in this case, thus, l. c. 311: 'The power, however, to dismiss because of the want of substantiality in the claim upon which the assertion of jurisdiction is predicated, does not apply to cases where the subject matter of the controversy is *per se* and inherently federal. *Swafford* v. *Templeton*, 185 U. S. 487, 493.'"

This Court, by dismissing this case, also overruled said language in *Equitable Life Assur. Soc.* v. *Brown, supra*, or ignored it, just as it did its decision in the Wulf case, all contrary to the established law with reference to judicial precedents.

On page 17 appears the following:

> "Plaintiff, in two capacities, was held by this court to be entitled to recover damages for violation of the constitutional rights involved in that case (*Bell et al.* v. *Hood et al.*, 90 Law Ed. 758). And so appellant herein, in two capacities, is entitled to recover, since it is alleged and admitted that appellants' federal rights were violated, to her damage, in both capacities."

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On page 25 of appellants' brief opposing motion to dismiss is the following:

> "This court has never permitted the Missouri Supreme Court to construe a federal law so as to prevent its application in the way Congress intended (*Pryor* v. *Williams*, 254 U. S. 43), nor any other state (*C. & O. Ry. Co.* v. *Kuhn*, 284 U. S. 44).
>
> Nor will it permit a state statute to be applied by a federal court to cut down federal rights (*Holmberg* v. *Armbrecht*, 90 Law Ed. 590).
>
> Section 43, Title 8, U. S. C., created rights which the state could neither cut down nor destroy."

On page 72 of the same brief:

> "The point to be determined in this case on this question is: Which law governs? Of course, the conclusion must be that the supreme law governs. For this court has never permitted Missouri, or any other state, to deny federal rights to any person by virtue of any state law when it came in conflict with federal statute, Treaty or Constitution."

In response to appellees' motion to strike, appellants say, p. 16:

> "The Civil Rights Statutes (R. S. U. S. 1979, 1980 and 1981), supplementing the Constitution, authorized Mrs. Moffett to bring the action in the state court in every capacity in which she had sustained injury. In disobeying the rules of construction made obligatory upon the state court by R. S. U. S. 1 (Section 1, Title 1, U. S. C.), and by Section 652, R. S. Mo. 1939, the state court erred in failing to construe said Civil Rights Statutes as required by such construction statutes, and erred in dismissing Mrs. Moffett's action on the ground of misjoinder of parties plaintiff, and thus and thereby denied appellants the rights, privileges and immunities secured by the provisions of

the Constitution, laws and Treaty referred to in the record herein.

Picking et al. v. *Pennsylvania R. Co. et al.*, 151 Fed. (2d) 240.
Bell et al. v. *Hood et al.*, 90 Law Ed. 758.
Georgia v. *Pennsylvania R. Co.*, 324 U. S. 439."

In the suggestions in support of appellants' motion concerning printing, page 9, it is said:

"On page 4 of appellees' reply they say that appellants never claimed the right to sue jointly until appellees' statement opposing jurisdiction suggested that appellants make such claim.

This is a most singular contention. To begin with, the physical fact that appellees devoted many pages to the futile contention that appellant could not sue in both capacities under the federal law, indicates that appellants must have made the claim somewhere. The question is—where? Appellants' pleading first raised said question. It is still alive.

The allegations of the fifth amended petition, as amended, in paragraph 19 thereof (224-225), refers to the deprivation of the rights guaranteed to appellants as to privileges and immunities, due process and equal protection of the laws, including Sections 51 and 52 of Title 18. It is there alleged that appellees: '* * * by reason of the injury thus caused plaintiff, became liable to said plaintiff under and by virtue of Sections 43, 47 and 48, Title 8, United States Code, the protection of which Constitution and statutory provisions the plaintiff here and now invokes."

And on page 4 of appellants reply to appellees' typewritten motion to strike, the concluding paragraph reads:

"*Burt* v. *City of New York*, 156 Fed. (2d) 791, (C. C. A. 2) agrees with the decision in *Picking et al.* v. *Pennsylvania R. Co. et al.*, 151 Fed. (2d) 240 (C. C. A. 3).

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Those decisions are in conflict with the decision of the Supreme Court of Missouri in this case, in holding that Mrs. Moffett has no right to recover under the Civil Rights Acts, and establish that if the conflict is to be settled by this court, the record must be printed, and appellees' motion to strike be denied."

In addition to the foregoing, it appears from the fifth amended petition (299-308) that appellees admitted that appellants' cause of action, as reflected in the allegations, was based upon appellees' violation of the rights secured to her by the XIVth Amendment and by the Civil Rights Acts. We quote the admissions made by appellees included in the 5th amended petition and reproduced in our jurisdictional statement, page 9:

"The petition charges that by reason of false and perjured testimony and the corruption of the trial judge, plaintiff was deprived of her property in violation of Section 1 of the 14th Amendment to the Constitution of the United States. • • • The petition further charges that by reason of the conspiracy and the corruption of the court, plaintiff was denied the rights secured to her by the Constitution of the United States 'and especially by the said provisions of the 14th Amendment to the Constitution of the United States, and by the provisions of Sections 51 and 52 of Title 18 • • • and that said defendants, by reason of the injury thus caused plaintiff, became liable to said plaintiff under and by virtue of Section 43, Title 8.'"

Appellees' said admission discloses that appellants' case was based upon a variety of denial of due process, equal protection and privileges and immunities which has always been regarded as the most iniquitous variety of denial of fundamental rights. In this connection we quote from

page 461 of Vol. LV of Beveridge's Life of Marshall, wherein he quotes the following language of the Chief Justice:

> "I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people, was an ignorant, a corrupt, or a dependent judiciary. (Marshall.)"

From the above and foregoing it is apparent that appellants have made the contention from the beginning, in their petition, assignments of error, their jurisdictional statement, brief, response and various motions, that her rights are governed by the federal law, and that the alleged and nonexisting state law cannot properly control this case.

It is evident that this contention of appellants has been overlooked by the court, for otherwise the *per curiam* opinion could not have been rendered herein.

But, even had the question on which the state court decided the case been a purely nonfederal ground, yet that rule, as to a nonfederal ground as heretofore applied in this Court, has no application to this case for the reason that under Section 16 of the new Code of Civil Procedure (Laws Missouri 1943, pages 360-361) a reversal of this case would merely necessitate the institution of a new suit by Mrs. Moffett in both capacities in the state court under the provisions of Section 16 of said Code.

And so this case is not a case where the erroneous decision of the federal question in this case by the state court could not be changed by a reversal by this Court. The judgment of reversal would save Mrs. Moffett the expense of instituting a new suit in the same capacities, for, on reversal, the state court could not render the same judg-

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ment. And, since the appellees admitted the facts alleged by Mrs. Moffett, does it not necessarily follow that it would be unjust to refuse to take jurisdiction and to enter that judgment of reversal which the admissions of the appellees necessitate under the decisions of Judge Learned Hand in *Burt* v. *New York*, 156 Fed. 791, and under the decision of Judge Biggs in *Picking et al.* v. *Railroad et al.*, 151 Fed. (2d) 240, and of this Court in the Wulf case.

The only reason for the failure to reverse, for error in ruling on the federal questions involved, in a case where the Constitution and laws of the United States are the basis of the plaintiff's claim, as here, is that originally given in *Murdock* v. *Memphis*, 20 Wall. 590, l. c. 635, and which reason has been reiterated in *Flournoy* v. *Wiener*, 321 U. S. 253, where Chief Justice Stone indicated that the court would take jurisdiction and reverse were it not for the fact that the opinion on reversal would be merely advisory and would accomplish no purpose. We reproduce the language of Chief Justice Stone on this subject in that case, l. c. 261-262:

> "Any determination which we might make of the Fifth Amendment question would thus leave unaffected the state court's judgment brought here for review. Our opinion on that subject would be advisory only, since there is nothing before us on which we could render a decision that would have any controlling effect on the rights of the parties. Hence the case stands in the same posture as those in which we have repeatedly held, that where the judgment of a state court rests in part on a nonfederal ground adequate to support it, this court will not consider the correctness of the decision which the state court also made of a federal question otherwise reviewable here. * * * In such a case this court has said that it will not enter 'a useless and profitless reversal' 'where the same judgment will be rendered by the

court below, after they have corrected the error in the federal question.' *Murdock* v. *Memphis*, 20 Wall. (U. S.) 590, 634, 635, 22 L. Ed. 429, 443, 444. Compare *Pugh* v. *McCormick*, 14 Wall. (U. S.) 361, 374, 20 L. Ed. 789, 791. For like reasons we have refused to answer questions certified to us by a lower federal court where it appears that the answer cannot affect the result. * * *

Appellant having assigned as error the decision of the Louisiana Supreme Court holding the Federal Act invalid, the case is properly an appeal, and appellant could have included in his assignments of error any other denial of federal right whether or not capable in itself of being brought here by appeal. *Prudential Ins. Co.* v. *Cheek*, 259 U. S. 530, 547, 66 L. Ed. 1044, 1055, 42 S. Ct. 516, 27 A. L. R. 27."

This Court has overlooked the rule that it will take judicial notice of a change in the law of the state under the facts in this case (*Vandenbark* v. *Owens Illinois Glass Co.*, 311 U. S. 538).

In the dissenting opinion, in *Flournoy* v. *Wiener, supra*, by Mr. Justice Frankfurter, with Mr. Justice Roberts and Mr. Justice Jackson concurring, it is pointed out that where the decision of an alleged state question also involves a federal question, then that this Court has jurisdiction, saying, l. c. 270-271-272:

"9. If a federal claim was drawn in question in *Smith* v. *Kansas City Title & T. Co.*, 255 U. S. 180, 65 L. Ed. 577, 41 S. Ct. 243, *supra*, and *Standard Oil Co.* v. *Johnson*, 316 U. S. 481, 86 L. Ed. 1611, 62 S. Ct. 1168, *supra*, it was not less drawn in question in this case. If the earlier two decisions are to continue to stand, I am unable to make a differentiation between them and the record before us. Much is to be said for the reasoning of Mr. Justice Holmes in the Kansas City Title & T. Co. case in urging that the

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incorporation of a federal act into a state law nevertheless makes the suit, for purposes of our jurisdiction, one arising under the state and not under the federal law. But his view was rejected. In the recent Standard Oil Co. case we had opportunity to adopt his view and reject that of the court in the Kansas City Title & T. Co. case. Instead, we unanimously applied the reasoning of the Kansas City Title & T. Co. case that where a decision under state law necessarily involves the construction or validity of federal law the determination of such federal law in the application of state law gives rise to a federal question for review here."

Herein the construction of the Civil Rights Acts was involved. As the Constitution gives corporations and artificial persons its protection (see *Smyth* v. *Ames*, 169 U. S. 466), as well as to citizens of the United States, there is no merit in the contention of the appellees that the constitutional protection was not given to Mrs. Moffett as executrix. Since it was, the Civil Rights Statutes were statutes of which Mrs. Moffett as executrix, and an individual, could avail herself. It necessarily follows that she was protected by the federal statutes, and the question involved was whether or not under the federal statutes she had a right to recover in both capacities. This necessitated a construction of these federal statutes, and the issue was tendered by the petition (224-225, 287-288). And the protection of the Constitution and of the Civil Rights Statutes, both civil and criminal, were specifically invoked (225).

As pointed out in the dissenting opinion in *Flournoy* v. *Wiener, supra,* l. c. 274, when it uses the following language:

> "* * * to throw out the case because 'Fourteenth Amendment' was not written is to make our jurisdiction the slave of words."

We also think the language of paragraph 12 of the dissenting opinion applies to this case, thus:

> "12. If the decision below can really be said to rest on a nonfederal ground, no assignment of errors could cure the defect. But it does not rest on a nonfederal ground. It rests on a federal ground—the federal ground that is written on almost every page of the record,"

as here.

III.

The Civil Rights Acts authorized Mrs. Moffett to bring the action in each and every capacity in which she was injured and damaged. And the action of the state court in dismissing the case on the ground of misjoinder of parties plaintiff, and of this Court in dismissing the appeal herein, deprived Mrs. Moffett of the federal rights given to her by said Acts.

This Court, in countless cases, has stated that Congress having declared when, how far, and to whom, carriers shall be liable on account of accidents in the specified class under the Federal Employers' Liability Act, such liability can neither be extended nor abridged by common or statutory laws of the state.

Said statement by this Court as to the Act of Congress there involved applies to the Civil Rights Acts here involved. And in this connection we reproduce Section 43, U. S. C., Title 8, as an illustration:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state

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or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

In *New York Central R. R. Co.* v. *Winfield*, 244 U. S. 147, it is held that the state could not, by its legislature, supplement the Act of Congress for any purpose, quoting from *Prigg* v. *Pennsylvania*, 16 Pet. 539, as follows, l. c. 153:

"'* * * if Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the state legislatures have a right to interfere; and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislation to act upon the subject matter. Its silence as to what it does not do is as expressive of what its intention is as the direct provisions made by it.'"

In *American Ry. Exp. Co.* v. *Levee*, 263 U. S. 19, the carrier was sued under the same Carmack amendment involved in *Missouri ex rel.* v. *Taylor*, 266 U. S. 200. The bill of lading contained a contract limiting liability to $50.00, but the state court applied the state law and held that the burden was on the carrier to, l. c. 20:

"* * * prove that the loss or damage had been occasioned by accidental and uncontrollable events,"

and gave a judgment in excess of $860.00. This Court held the limitation was applicable under the federal law, and that, l. c. 21:

> "The effect of the stipulation could not have been escaped by suing in trover, and laying the failure to deliver as a conversion, if that had been done. *Georgia, F. & A. R. Co.* v. *Blish Mill. Co.*, 241 U. S. 190, 197, 60 L. Ed. 948, 952, 36 Sup. Ct. Rep. 541. No more can it be escaped by a state law or decision that a failure to deliver shall establish a conversion unless explained. The law of the United States cannot be evaded by the forms of local practice."

In *Davis* v. *Weschler*, 263 U. S. 22, a Missouri rule of procedure was applied, holding that, under the decisions, the question of venue was waived by appearance. But this Court held that a rule of state practice could not defeat a federal right. At l. c. 24, the Court said:

> "We are of opinion that the judgment must be reversed. Whatever springes the state may set for those who are endeavoring to assert rights that the state confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. * * * The state courts may deal with that as they think proper in local matters, but they cannot treat it as defeating a plain assertion of federal right. The principle is general and necessary. *Ward* v. *Love County*, 253 U. S. 17, 22, 64 L. Ed. 751, 758, 40 Sup. Ct. Rep. 419. If the Constitution and laws of the United States are to be enforced, this court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds. *Creswill* v. *Grand Lodge, K. P.*, 225 U. S. 246, 56 L. Ed. 1074, 32 Sup. Ct. Rep. 822. This is familiar as to the substantive law, and for the same reasons it is necessary

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to see that local practice shall not be allowed to put unreasonable obstacles in the way. See *American R. Exp. Co.* v. *Levee*, decided this day (263 U. S. 19, *ante*, 140, 44 Sup. Ct. Rep. 11)."

Section 43, Title 8, U. S. C., authorizes recovery from appellees for the acts alleged by:

1st: "• • • any citizen of the United States."
2nd: "• • • or other person within the jurisdiction thereof."

in

1: "• • • an action at law."
2: "• • • suit in equity."
3: "• • • or other proper proceeding for redress."

The wrongs for which recovery may be had are:

"• • • deprivation of any rights, privileges, or immunities secured by the Constitution and laws."

The liability is "to the party injured" only in one "action at law," etc.

Mrs. Moffett is a citizen of the United States, and also executrix of her husband's estate.

As executrix, she is not a citizen of the United States.

As a citizen of the United States, she is not an executrix.

As executrix she is an "other person within the jurisdiction thereof" (United States).

Did Congress, by said language, intend that Mrs. Moffett, who sustained injuries in both capacities by the same overt acts of appellees, pursuant to the same conspiracy, must bring separate actions therefor?

The proper interpretation of the language demonstrates that Congress never had any such intention.

The word "or," when used to connect a series of words in the permission or the prohibition of an action, should be construed to mean "and" when necessary to make the statutes express the true legislative intent. (*United States* v. *Fisk*, 3 Wall. 444, l. c. 447.)

The recovery can be had for the "deprivation of any rights."

Of course, the "any rights" mentioned would include any rights which Mrs. Moffett had, either as a citizen of the United States, or in her capacity as executrix. Not only so, but she could couple in her suit her right to recover as a citizen of the United States for the "• • • deprivation of any • • • privileges, or immunities," secured by the XIVth Amendment, which only apply to her capacity as such citizen (*Paul* v. *Virginia*, 8 Wall. 168), as well as for property loss which she sustained in her capacity as a "person" (executrix) and not as such citizen.

That the Congress intended that this recovery could be had in a single action is demonstrated by the provision that the guilty persons shall be liable, not to the citizen of the United States as such, nor to the other person mentioned in the statute as such, but to "the party injured"—not in a multitude of actions, but in "an action at law," or in a "suit in equity," or "other proper proceeding for redress."

It is manifest that this statute expresses the same intent as to one "action," or "suit" or "proceeding" which this Court attributed to Congress in *St. Louis, I. Mtn. & S. Ry. Co.* v. *Craft*, 237 U. S. 648. In construing the Act of Congress there involved, which authorized recovery for the injury which deceased could have recovered had he lived, in connection with the provision authorizing recovery for the loss sustained by his death

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while employed in interstate commerce, this Court held that the suit involved two causes of action, saying, l. c. 658:

> "Although originating in the same wrongful act or neglect, the two claims are quite distinct, no part of either being embraced in the other. One is for the wrong to the injured person, and is confined to his personal loss and suffering before he died, while the other is for the wrong to the beneficiaries, and is confined to their pecuniary loss through his death. One begins where the other ends, and a recovery upon both in the same action is not a double recovery for a single wrong, but a single recovery for a double wrong."

This was followed in *Baltimore & Ohio S. W. R. Co.* v. *Carroll*, 280 U. S. 491, l. c. 495:

> "The statute, it is true, provides that 'there shall be only one recovery for the same injury'; but this has the effect of not merging the two rights into a single cause of action, but of limiting the personal representative 'to one recovery of damages for both, and so to avoid the needless litigation in separate actions of what would better be settled once for all in a single action.'"

Why should the Congress provide for such recovery "in an action at law" if it meant *two* actions at law?

The word "party" in said Section 43 applies to Mrs. Moffett for the loss resulting from the deprivation of her privileges and immunities under the XIVth Amendment as a citizen of the United States; and also applies to her in her individual capacity, wherein she has been deprived by appellees in violation of said Acts of Congress of the property which would have been hers as

sole beneficiary under her husband's will had appellees not violated her federal right by destroying same. And the word "party" also applies to Mrs. Moffett by the use of the words "or other person" in her capacity as executrix.

Section 47, Title 8, U. S. C., provides that if one or more conspirators do, or cause to be done,

> "* * * any act in furtherance of the object of such conspiracy, whereby another is injured in his *person* or *property*, or deprived of having and exercising *any right or privilege of a citizen of the United States*,"

that then

> "* * * the party so injured or deprived may have *an action for the recovery of damages* occasioned by such injury or deprivation,"

Does not said section expressly authorize "an action for damages" in all capacities?

Said language necessarily contemplates that a wrong whereby another is injured in his *person* or *property* specifically contemplates the right of the party so injured or deprived to include himself in every capacity in which he is so injured or deprived, whether he be an individual or an executor or administrator, or merely a citizen of the United States. And it explicitly provides that for the injury to another, "*either* in his *person* or *property*" (which language, of course, refers to different capacities), such other may be an executor who has sustained injury to or loss of the property held as executor; and he may also be an individual who sustains the injury to his person. But the right to recovery is limited to "an action for the recovery of damages occasioned by such injury or deprivation." That language excludes *two* actions for

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damages, and authorizes the joinder of the party injured in both capacities.

And, since there could be no deprivation of the privileges and immunities (which are limited to citizens of the United States) by an executor, whose loss could only be a property loss resulting from conversion or injury to the assets, we have a situation where the Congress, in said section, contemplates recovery by any such person in any capacity in which he sustains personal injury, property loss, or loss of privileges and immunities, and limited it merely to one action for damages, for the section says:

> "• • • the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation,"

It is manifest that the last quoted language has exactly the same meaning as the language contained in the amended Federal Employers Liability Act, authorizing recovery in the same action for two causes of action by providing that

> "• • • there shall be only one recovery for the same injury."

And so we have a situation to which the statement in the Craft case, *supra*, applies and authorizes recovery by the person so injured in every capacity in the one action for damages therein mentioned:

> "• • • and so to avoid the needless litigation in separate actions of what would better be settled once for all in a single action."

This circumstance necessarily makes the decision of this Court in *M. K. & T. R. Co.* v. *Wulf*, 226 U. S. 570, exact

authority for the proposition that the decisions construing the Federal Employers Liability Act, which provides a remedy, apply to these two sections (43 and 47, Title 8 U. S. C.) which also provide a remedy.

The Employers Liability Act provides a remedy for those injured by negligence for which they were entitled to recover under the existing law before the enactment of the Employers Liability Act in every State.

By the same token the Civil Rights Acts provide a remedy for the recovery of those damages in all capacities for which the injured citizen or person had a right to recover without the aid of the Civil Rights Acts. (See *Scott* v. *Donald*, 165 U. S. 58; *Bell et al.* v. *Hood et al.*, 90 L. Ed. 758.)

The authorities cited in support of the per curiam opinion have no application to this case, for the reason that both of said decisions dealt with cases based wholly on state law, and hence are no authority for the dismissal of an appeal wherein federal questions, which are *per se* and inherently federal, are involved.

That is to say, Mrs. Moffett's right to recover herein is based on the Civil Rights Acts and not on the state law.

And so the statement of this Court in *Equitable Life Assur. Soc.* v. *Brown*, 187 U. S. 308, should apply herein rather than the inapplicable statements of the law in those cases. We respectfully submit that the following excerpt from said opinion is the correct statement of the applicable law in this case, l. c. 311:

> "The power, however, to dismiss, because of the want of substantiality in the claim upon which the assertion of jurisdiction is predicated, does not apply to cases where the subject matter of the controversy is *per se* and inherently federal. *Swafford* v. *Templeton*, 185 U. S. 487, 493."

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IV.

Burt v. _City of New York et al._, 156 Fed. (2d) 791 (C. C. A. 2), and _Picking et al._ v. _Pennsylvania R. Co. et al._, 151 Fed. (2d) 240 (C. C. A. 3), construe and apply Sections 43 and 47, Title 8, U. S. C. A., holding that under the decisions of this Court said statutes are valid, and that statutes of a state cannot operate to deprive Mrs. Moffett of the rights given by the federal statutes.

Appellants' brief was filed in the Supreme Court of Missouri on August 17, 1945. *Picking et al.* v. *Pennsylvania R. Co. et al.*, 151 Fed. (2d) 240 (C. C. A. 3), which was published in the advance sheets on November 26, 1945, could not have been included therein. And the conclusion to be drawn from its opinion is that it concluded that the action could not be maintained under the Civil Rights Act.

In *Burt* v. *City of New York*, 156 Fed. (2d) 791, the decision of the Circuit Court of Appeals for the second Circuit by Judge Learned Hand was published in the advance sheets for October 7, 1946. So that neither the Missouri Supreme Court, nor this Court, had the benefit of the opinion in *Burt* v. *City of New York*.

In both the Picking and the Burt cases the questions involved were the rights of litigants to pursue the remedy provided by Sections 43 and 47 of the Civil Rights Acts for injuries to the person, or deprivation of property rights.

Both opinions refer to the questions which were settled by opinions of this Court with reference to the right to recover under the Civil Rights Acts.

The Picking case dealt exclusively with R. S. 1979, or Section 43, Title 8, U. S. C. In reversing the district court the Court of Appeals called attention to the decision

in a number of cases which held that the Federal Rights Acts did not give the rights asserted in the Picking petition in that case. It then referred to *United States* v. *Classic*, 313 U. S. 299, and *Screws* v. *United States*, 325 U. S. 91, pointing out that (l. c. 248):

> "The phrase 'under color of any statute • • • ' employed in R. S., Sec. 1979, must be construed as was the phrase 'under color of any law' in the Screws case."

And then states, l. c. 249:

> "As we read R. S., Sec. 1979, in the light of the Screws decision we are compelled to the conclusion that Congress gave a right of action sounding in tort to every individual whose federal rights were trespassed upon by any officer acting under pretense of state law."

And then stated:

> "It follows that if the plaintiffs in the case at bar were deprived of a federal right by state officials or officers acting 'under color of any law'—or as may be stated more aptly in the instant case, 'under color of any statute • • • of any state'—these officials must respond in damages to the plaintiffs as prescribed by R. S., Sec. 1979."

And concluded:

> "The plaintiffs have stated a valid cause of action rising under R. S., Sec. 1979, insofar as the individual defendants are concerned."

In *Burt* v. *New York*, Judge Learned Hand states, l. c. 791-792:

> "Whatever may have been true before, it seems to us that, since the decision of the Supreme Court in

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Snowden v. *Hughes*, 321 U. S. 1, 64 S. Ct. 397, 88 L. Ed. 497, such allegations will support an action under Sec. 43 and Sec. 47 (3) of Title 8, * * *"

Further discussing the effect of *Snowden* v. *Hughes*, 321 U. S. 1, in *Burt* v. *City of New York*, 156 Fed. (2d) 791, Judge Learned Hand said, l. c. 792:

"* * * but the decision definitely settled it, that, if a complaint charges a state officer not only with deliberately misinterpreting a statute against the plaintiff, but also with purposely singling out him alone for that misinterpretation, it is good against demurrer."

And in the Burt case, discussing the effect of the Screws decision, 325 U. S. 91, Judge Hand said, l. c. 792:

"Further, if there remained any longer doubt whether the act of a state officer is the act of the state, if done under the pretended justification of a statute, that doubt was laid by *Screws* v. *United States*, 325 U. S. 91, 107-112, 64 S. Ct. 1031, 89 L. Ed. 1495. It is true that that case involved Sec. 52 of Title 18, U. S. C. A.—the criminal sanction for the 'Civil Rights Act'; but, as Judge Biggs observed in *Picking* v. *Pennsylvania R. Co.*, 3 Cir., 151 F. (2d) 240, 248, the phrase 'under color of any statute' occurs in both Sec. 43 of Title 8, U. S. Code, and Sec. 52 of Title 18, and must be taken as having the same meaning in each. See also *Hague* v. *Congress of Industrial Relations*, 307 U. S. 496, at page 510, 59 S. Ct. 954, 83 L. Ed. 1423."

Judge Hand further said, l. c. 792:

"Our conclusion that the amended complaint stated a cause of action is confirmed by *Picking* v. *Pennsylvania, supra.*"

Holding that a procedural remedy provided by the state for the wrong done did not diminish the plaintiff's right under the Civil Rights Acts, the court said, l. c. 793:

> "However that may be, clearly it is not an effective substitute for the damages which the plaintiff may have suffered from the subordinate officers whom he has made defendants, or from the Board itself. The risk of a recovery against them for these does on its face appear substantial; and indeed in *Picking* v. *Pennsylvania R. Co., supra* (3 Cir., 151 F. (2d) 240), it was held that the 'Civil Rights Act' actually tolled the privilege of a judge."

It thus appears that in *Burt* v. *New York, supra,* Judge Hand, with the concurrence of the entire court, has expressly ruled that a state procedural act can not be substituted for the action for damage provided by the Civil Rights Acts as a remedy for the wrong.

The same principle applies in this case to prevent the purported but nonexisting rule of state law from preventing a recovery by Mrs. Moffett in both capacities against appellees which was held in the Picking case not to relieve one of the appellees in that case from the liability imposed upon him by his violation of the Civil Rights Acts herein involved. It was there said, l. c. 251:

> "One further point, however, arises in respect to Governor James. Statutes of Pennsylvania, the Act of April 9, 1929, P. L. 177, Art. V, Sec. 512, and Art. IX, Sec. 902 of the same Act, 71 P. S. Pa., Secs. 192 and 292, provide that the Department of Justice of Pennsylvania shall have the power and duty to furnish legal advice to the Governor of Pennsylvania concerning any matter arising in connection with the exercise of his official powers; that if the Chief Executive, having requested and received legal advice from the Department of Justice, bases his official conduct

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upon such advice, 'he shall not be in any way liable for so doing.' • • • Counsel for Governor James contend that the provisions of these statutes relieve him from any liability in the instant case. We cannot agree since the cause of action arises under the Civil Rights Act. We can find no case in point, but the language employed by the Supreme Court in *Sola Electric Co.* v. *Jefferson Co.*, 317 U. S. 173, 176, 63 S. Ct. 172, 174, 87 L. Ed. 165, is suggestive of the decision which we should reach. It is as follows: 'When a federal statute condemns an act as unlawful the extent and nature of the legal consequences of the condemnation • • • are • • • federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield.'

• • • • • • •

"Obviously, if a state statute purports to confer immunity upon an official of a state who has violated the provisions of the third Civil Rights Act by depriving an individual of a federal right, the state has invaded the liberties of the individual which are protected by the Fourteenth Amendment. It follows that the court below was in error in dismissing the complaint as to Governor James."

By the same token, the alleged procedural statute could ot be considered by the state court, or this Court, and pplied for the purpose of preventing a recovery by Mrs. loffett in every capacity in which she was damaged. In ther words, when a litigant chooses a state court to nforce his or her federal rights under the remedial statte enacted by Congress to enforce said federal rights, he federal remedial statutes supersede all state laws in onflict therewith.

V.

Had Mrs. Moffett instituted this action in one capacity to the exclusion of the other, the decision of the Missouri court for or against her would have prevented another action in the other capacity, and so she was entitled, as against a demurrer on the nondemurrable ground of misjoinder of parties plaintiff, to recover in the state court in both capacities.

Appellees, on page 147 of the appendix to their statement opposing jurisdiction, submitted the following to this Court:

> "(1) An examination of plaintiff's amended bill disclosed that the plaintiff, Louise McGrew Moffett, as sole beneficiary of Thomas S. Moffett, deceased, was a party and filed pleadings in the suit (No. 7374) in the District Court of Harper County. Therefore, the judgment rendered in such suit was binding upon her in her capacity as executrix of the Thomas S. Moffett estate. See *Chicago, R. I. & P. Ry. Co.* v. *Schendel,* 270 U. S. 611, 618, 46 S. Ct. 420, 70 L. Ed. 757, 53 A. L. R. 1265."

If said statement correctly declares the law (which, as to the void Kansas judgment, we deny), there could be no misjoinder.

The Missouri court in *In Re Thomasson's Estate,* 196 S. W. (2d) 155, in discussing the question before the court, pointed out that an administratrix of an estate was bound by the judgment in her individual capacity. The court held that, in *Rossi* v. *Davis,* 345 Mo. 362, l. c. 383, she contended that a contest proceeding, l. c. 158:

> "• • • was prosecuted by her as *administratrix* and not *as an individual,* and, therefore, was not binding upon her *individually,* and did not violate the no-contest clause of the trust instrument. This contention

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was disallowed, the court considering that as administratrix she also represented herself as an heir and as an individual."

The Missouri court, in *Rossi* v. *Davis*, 345 Mo. 362, l. c. 383, adopted the following as Missouri law from the opinion of the illustrious Judge Bleakley of the Georgia court of last resort in *Fouche, Assignee, et al.* v. *Harison, Executor, et al.*, 78 Ga. 359, 410:

"Whoever heard that an executor has to make himself a party to his own bill in order to bind himself individually, or to give himself, as creditor, legatee or otherwise, the fruits of the decree to the extent of his personal interest in the same? Is it possible to doubt that on the present bill it would be competent to decree the proper disposition to be made of the legacies, whether to pay them out on the claims of creditors, or to hold them free from such claims? And how could the executor, as an individual, either shun the burden or be shorn of the benefit of any rightful decree on that subject that might be rendered? Unless we are wholly unfit to be judges on such a plain question, we are at a loss to understand why it should be considered a question at all. That no direct authority upon it has been produced must be due alone to the fact that legal evolution has not progressed far enough to develop a needless precedent for a necessary conclusion.

We think the reasoning of the Georgia court is sound and that it is sustained by *Corcoran* v. *Chesapeake & Ohio Canal Co.*, 94 U. S. 741, 745."

VI.

Rule 29 of the trial court was the law of the court (*Irrigation Co.* v. *Gildersleeve*, 174 U. S. 603, l. c. 608-609; *Meierhoffer* v. *Hansel*, 294 Mo. 195), binding parties, judge and court, and failure to obey it deprived Mrs. Moffett of the federal rights secured by Section 1 of the XIVth Amendment.

Mrs. Moffett is entitled to a rehearing in this case because the initial or original question shown by the record in this case is a federal question, to-wit: Whether or not a single state judge violated appellants' federal rights to notice and hearing, deciding the case on demurrer on the day that it was filed, in violation of its Rule 29 (402-403) and thereby rendering a judgment without notice or jurisdiction, contrary to the due process and equal protection provision of the XIVth Amendment.

That question was wholly overlooked by this Court, and this notwithstanding that this and the state court have decided that the rule of the court is the law of the court, and binding on each individual member of the court, and deprives him of discretion to disobey it—and to deny its protection to Mrs. Moffett was to deny to her the equal protection of the laws.

Rule 29 (402-403), adopted by the Circuit Court *en banc*, was binding on the single judge who acted on December 30, 1944. It reserved no discretionary power in him, and hence his act in sustaining said demurrers on said date was in direct conflict with the law as declared by this Court in *Rio Grande Irrigation Co.* v. *Gildersleeve*, 174 U. S. 603, l. c. 608-609, where this Court said:

> "There is a rule prescribed by the Supreme Court of the territory, in the following terms:
> 'No motion to set aside any finding or judgment rendered in vacation shall be entertained, unless it

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shall be filed and a copy thereof served upon the opposite party within ten days after the entry of such finding or judgment.'

As no discretionary power was reserved to the trial judge, he could not dispense with this rule of court. As was said in *Thompson* v. *Hatch,* 3 Pick. 512:

'A duly authorized rule of court has the force of law, and is binding upon the court as well as upon parties to an action, and cannot be dispensed with to suit the circumstances of any particular case. * * * The courts may rescind or repeal their rules, without doubt; or, in establishing them, may reserve the exercise of discretion for particular cases. But the rule once made without any such qualification must be applied to all cases which come within it, until it is repealed by the authority which made it.'"

The state court, in many decisions, had theretofore decided that to deny a litigant the benefit of the rule with reference to the particular question here involved was to violate his constitutional rights. See *Meierhoffer* v. *Hansel,* 294 Mo. 195.

In *Meierhoffer* v. *Hansel, supra,* at l. c. 202, the court said:

"The Circuit Court of Jackson County, at Kansas City, consists of nine divisions, and by statutes, Sections 2450 to 2454, inclusive, the judges are empowered to make rules and regulations for the trial of causes pending therein and, perforce of said statutes, such rules thus made become the law."

The court discusses the failure of an individual judge, both as assignment and trial judge, as in this case, to enforce the rules, including Rule 29 involved in this case. Judge Reeves, now a federal judge, writing the opinion of the Supreme Court of Missouri, said, l. c. 206:

> "It is apparent that the constitutional rights of the appellant were violated, as the processes of the law were not permitted to operate in his behalf, and the privileges and benefits of the law were denied to him."

Appellees claim that the notice provided by Rule 29 would not do Mrs. Moffett any good. Had the rule been complied with, then neither the trial court nor the Supreme Court could have sustained the demurrer because the new Code went into effect on the succeeding court day, and said new Code had repealed the law and went into effect on January 1, 1945.

And, in any event, Mrs. Moffett was entitled to call the court's attention, before it rendered a judgment, to the fact and the law that, within the meaning of the law, three demurrers had not been sustained because, as to defendant Kopp only two pending demurrers had been sustained and a record made sustaining a nonpending demurrer. And as to the other defendants, Judge Buzard's orders overruling their attacks on the first amended petition on the same ground of misjoinder of parties plaintiff were standing and not set aside when Judge Terte sustained demurrers to the same first amended petition, and thus undertook to exercise jurisdiction that he did not have, to-wit, appellate jurisdiction over Judge Buzard.

The trial court refused to permit appellants to present their contention with reference to the demurrer, and of course with reference to the judgment, in violation of Rule 29 (402-403), and thereupon and as a part of the same transaction applied Section 948, R. S. Mo. 1939, and its penalties against Mrs. Moffett without a hearing.

Appellants assigned as error the action of the trial court in so applying the penalties of said Section 948 without a hearing, evidence or argument (406) with reference to the

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basis for the application of said statute, which application operated to make said statute a bill of pains and penalties in this case, in violation of Section 10 of Article I of the Constitution on that subject.

Mrs. Moffett could only question that statute in the way in which it was applied to her herein, and to her disadvantage (*Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282). The following from that opinion discloses that this case is rightly here on appeal on that one ground alone, if on no other, for this Court said, l. c. 290:

> "Our conclusion on the jurisdictional question is that, as the state court applied and enforced to the plaintiff's disadvantage a state statute which the plaintiff seasonably insisted as so applied and enforced, was repugnant to the Constitution and void, the case is rightly here on writ of error."

The opinion of the state court recognized that the invalidity of the statute as applied was assigned as error on the ground of being repugnant to the Constitution, and decided the question, but in doing so it incorrectly stated the facts on which it based its decision, as hereafter shown.

This Court, in *Ancient Egyptian Arabic Order N. M. S.* v. *Michaux*, 279 U. S. 737, has declared the applicable rule, l. c. 744-745:

> "The right thus specially set up in the state court is a federal right. Whether it was denied or not given due recognition by the challenged decree, as affirmed, is a question on which the defeated claimants are entitled to invoke the judgment of this court, as is done in their petition for certiorari. And it is our province to inquire not only whether the right was denied in direct terms, but also whether it was denied in substance and effect by interposing a nonfederal ground of decision having no fair support."

Appellees claim that the notice would not do Mrs. Moffett any good. In this they are in error, for had the trial court complied with Rule 29 (402-403), neither it nor the Supreme Court could ever have sustained said demurrer on any ground for the reason that by the new Code, which went into effect the following court day and less than the two days required by the notice, the statute authorizing demurrers, even had it included the ground of misjoinder of parties plaintiff, and Section 948 were repealed, and could never have been enforced in this case.

And in any event, in *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, in discussing the question of lack of the notice provided by law upon the ground that it would not do any good anyhow, this Court said:

> "The fallacy of this is that it ignores the issue of law raised by the petition of plaintiff in error, and substitutes an issue of fact for which he was not summoned and which he has not consented to litigate. To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits. *Rees* v. *Watertown*, 19 Wall. 107, 123, 22 L. Ed. 72, 77.
>
> Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires. * * *
>
> 'This notice must be provided as an essential part of the statutory provision, and not awarded as a mere matter of favor or grace.' In *Roller* v. *Holly*, 176 U. S. 398, 409, 44 L. Ed. 520, 524, 20 Sup. Ct. Rep. 410, the court declared: 'The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion.' And in *Louisville & N. R. Co.* v. *Central Stock Yards Co.*, 212 U. S. 132,

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144, 53 Law Ed. 441, 446, 29 Sup. Ct. Rep. 246, it was said: 'The law itself must save the parties' rights, and not leave them to the discretion of the courts as such.' "

In *State ex rel. Pedigo* v. *Robertson*, 181 S. W. 987, the Missouri Supreme Court *en banc*, through the late Judge Faris, later an eminent judge of the United States Circuit Court of Appeals, in discussing the duty of the court to enforce this rule, stated, l. c. 988:

> " 'These rules apply to all persons, all cases, and all representatives of clients alike, and must be construed in one case just as they have been or will be in another, irrespective of the case, the parties or their counsel.'
>
> Subject to exceptions, none of which are here to the fore, the law as to the binding force and obligation upon the court of a rule of practice which such court adopts, in Cyc. is stated thus:
>
> 'There are numerous cases which declare that rules of court should be adhered to both by parties litigant and the court, in all cases which fall within them so long as they remain in force, and that the court has no power in a particular case, where no discretion is reserved, to suspend or modify any rule which it has made.' 11 Cyc. 743."

Division 1 of the State Supreme Court, in its opinion herein by Judge Clark, stated appellants' contention as follows:

> "Appellants contend: • • • *that he had no jurisdiction to pass on the demurrers without at least two days' notice to appellants under court rules;*"

Disposing of the question, the court said:

> "(4) The circuit court of Jackson County is a multiple judge court. Its rules provide that the court *en*

banc shall from time to time select one of the judges as presiding or assignment judge, whose duty it is to pass upon motions and demurrers, make up the issues and assign cases to the different divisions, including his own division. Two days' notice is necessary to call up a demurrer unless waived or a different time be fixed by the presiding judge. The demurrers to the fifth amended petition were filed on or before December 6, 1944. Then appellants filed a reply on the theory that the demurrers were really answers, which reply was after a hearing stricken out on respondents' motions. Then on December 30, 1944, with all parties present by counsel, the demurrers were presented to Judge Ridge. Appellants, by leave of court, withdrew paragraph 45 of their fifth amended petition, and respondents refiled their demurrers. Appellants requested at least two days' delay on the ground that the demurrers had just been filed. The court, in the exercise of proper discretion, denied this request. *Kuh* v. *Garvin*, 125 Mo. 547, 28 S. W. 847, loc. cit. 851. The withdrawal of paragraph 45, which related to a suit brought by respondent Kopp against Mrs. Moffett, in no way affected the point made in the demurrers as to misjoinder of parties plaintiff or failure to state a cause of action. We see no violation of the rules."

Rule 29 (402-403), the latest rule shown in the record, is complete in itself and contains nothing in it justifying the following from the above statement:

> "* * * unless waived or a different time be fixed by the presiding judge. * * * The court, in the exercise of proper discretion, denied this request,"

citing a case in which the question here involved was not involved. Can this Court permit a state court to waive something in its rules which is not there and thus avoid its duty to exercise its appellate jurisdiction? This ques-

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tion was assigned as error in the Supreme court of the state on the ground that such acts on the part of the court violated appellants' rights under the due process and equal protection clauses of the XIVth Amendment.

The State Supreme Court is thus shown to have decided the federal question thus presented, but this Court ignored it.

The question thus decided by the trial court and by division 1 of the Supreme Court, against Mrs. Moffett was the first decision in the case on any question, and preceded the ruling sustaining the demurrers on the ground of misjoinder of parties plaintiff and the dismissal of the case on said ground. This Court has often decided that it is bound by the record before the state court. Under the law as declared by the State of Missouri, through its legislature and Supreme Court, it was bound by the recital that (406):

> "And at the same time, and as a part of the same proceeding and order sustaining said alleged demurrers, said circuit court, without any evidence having been offered to sustain same, and without notice thereof or hearing or jurisdiction so to do, made and entered the following order and judgment in said court and cause:"

The bill of exceptions (410-425) and the record (402-406) sustain said record recital. There was just one way for appellees to get away from that recital in this Court or in the Supreme Court of Missouri, and that was by filing a counter-abstract containing recitals contradicting same. The certified transcript of the record shows that appellees filed a counter-abstract, in which they failed to question said recital. And for said reason the recital became conclusive upon the parties and all the courts, including this,

under the decision of the State Supreme Court in *Eliot* v. *Railroad,* 204 Mo. 1, l. c. 12-13:

> "Plaintiff, in filing an additional abstract to supply matters omitted in defendant's abstract, must be considered as having waived any other objection to it than as indicated in the additional abstract; and as the abstract shows that the bill of exceptions was duly filed and also states what the record shows, it is conclusive, in the absence of a counter-abstract showing to the contrary. (*Lumber Company* v. *Knights of Pythias, supra; Martin* v. *Castle,* 182 Mo. 216.)"

Could this Court properly leapfrog this federal question?

Weighted down, as it was and is, with the law and the authorities to the contrary, it was and is a physical and legal impossibility so to do.

Such impossibility is well illustrated by Mark Twain's report of the case of "The Celebrated Jumping Frog of Calaveras County," as detailed in Jessup's Edition of The World's Best Books, page 102, l. c. 106-107.

VII.

The decision of the state court sought to be reviewed was not based on a nonfederal ground adequate to support it, because:

1st. The Civil Rights Acts provided an exclusive remedy and authorized Mrs. Moffett to sue in both capacities.

2nd. A demurrer on the ground of misjoinder of parties plaintiff was not allowed by the state law.

It is unnecessary to discuss the 1st reason referred to in the above heading, because it has been amply discussed heretofore.

The 2nd ground, to-wit: that the state statute did not allow a demurrer for misjoinder of parties plaintiff is settled by the statute itself (Section 922, R. S. Mo. 1939), plus its construction by this Court in *Magwire* v. *Tyler*, 17 Wall. 253, l. c. 286, and later followed by the Missouri Supreme court.

The ground upon which the judgment of the Supreme Court of Missouri is based was that there is a misjoinder of parties plaintiff—a ground of demurrer not allowed by the Missouri statute.

In *Magwire* v. *Tyler*, 17 Wall. 253, l. c. 286, this Court so decided. The Missouri demurrer statute was in the same language from its enactment in 1855 to December 30, 1944. Section 922, R. S. Mo. 1939, was the only statute authorizing demurrers on December 30, 1944. The opinion in the Magwire case, l. c. 286, embodies said statute and construes it, thus:

> "By the same statute it is enacted that the defendant may demur to the petition when it shall appear upon the face thereof, either (1) that the court has no jurisdiction of the person of the defendant or the subject matter of the action; (2) that the plaintiff has not legal capacity to sue; (3) that there is another action pending between the same parties for the same cause of action in the state; (4) that there is a defect of parties plaintiff or defendant; (5) that several causes of action have been improperly united; (6) that the petition does not state facts sufficient to constitute a cause of action; (7) that a party, plaintiff or defendant, is not a necessary party to a complete determination of the action. 2 Rev. Stat. 1231.
>
> *No other grounds of demurrer are allowed by the statutory rules of pleading.*" (Italics ours.)

Said construction of the demurrer statute by this Court was necessitated by a judgment of the Supreme Court of Missouri in *Magwire* v. *Tyler*, 47 Mo. 115 (by the same judge who decided *Cummings* v. *Missouri*, 4 Wall. 277), disobeying a mandate of this Court by holding that this Court was without jurisdiction to decide whether the decision was based on a nonfederal ground adequate to sustain it, even though rights under an Act of Congress were involved.

There the state court found that the pleadings made the case a suit in equity and that the opinion and mandate of this Court operated to make it a suit at law and that consequently the state court was bound by the state law rather than the federal and was without power or jurisdiction under the state law to give effect to the judgment of this Court or to the Act of Congress there involved. In principle its act was on all fours with the contention of appellees on which this Court has dismissed this appeal. It undertook to decide what questions could be decided by this Court. Thus (47 Mo. l. c. 125-126):

> "The only question which it was competent for the Supreme Court of the United States to notice when the cause was removed there was the question of title arising out of the respective confirmations under which the parties claimed.
>
> Everything else set up in the bill and answer was peculiarly and exclusively of local state jurisdiction, over which the national tribunal had no control, and concerning which an adjudication here is final."

The opinion expressly held that the jurisdiction of this Court was restricted to questions arising under the laws of the United States: that regardless of the way the state law was involved with the federal law this Court could not

consider any question arising under the state law, and then dismissed the case instead of obeying the mandate.

On appeal from the judgment of dismissal the counsel for plaintiff in error finished his brief (see 21 Law Ed. of the report in *Magwire* v. *Tyler*) thus, l. c. 579:

> "In conclusion, we are perfectly satisfied that no reliance can be placed in the Supreme Court of Missouri to concede to our client any right in the property in dispute, in law or equity."

Evidently this Court accepted said statement as correct and reversed the judgment of dismissal and itself rendered the appropriate judgment and awarded execution, saying, l. c. 585 (84 U. S. 290):

> "• • • it seems to be quite clear that it would be useless to remand the cause a second time, as the court has virtually decided that they cannot, in their view of the law, carry into effect the directions of this court as given in the mandate."

The decision of the State Supreme Court necessitated a full examination of the Missouri code of civil procedure by this Court so as to enable it to determine whether or not the State Supreme Court had jurisdiction to comply with the mandate. This made it necessary to construe the code —insofar as it prescribed rules of pleading and prescribed how rights could be waived. This Court then decided that the parties interested had waived all right to question the jurisdiction by failure to raise such questions by demurrer or answer under the statutes.

It thus appears that it was necessary for this Court to determine what grounds of demurrer were allowed, and it decided that, l. c. 286:

"No other grounds of demurrer are allowed by the statutory rules of pleading" (Sec. 992, R. S. Mo. 1939).

It further decided, l. c. 286:

"* * * a demurrer for want of form is not allowed; nor is the jurisdiction of the court in any way affected by forms."

It further pointed out, l. c. 286:

"Such objections as those enumerated in the 6th section (same being the demurrer statute), if they do not appear on the face of the petition, may be taken by answer, * * *"

and if such objections are not taken either way, then they are waived.

It thus appears that said construction of said statute by this Court was necessary, that it was not obiter, and that said construction in the year 1873, as written in said opinion, was written into Section 922, R. S. Mo. 1939, by the seven revisions of the Code in the same language, as much so as if embodied in the statute itself. And under the law as declared by the Supreme Court of Missouri in many cases that court could not amend said Section 922 in this case by incorporating therein the ground of misjoinder of parties plaintiff, for that was the function of the legislature alone. (*Ex Parte Carey*, 306 Mo. 287, l. c. 294).

It thus appears that this Court has itself decided in the Magwire case, that the ground upon which the state court's judgment was rendered was a nonexistent ground. And yet its *per curiam* opinion herein, in direct conflict with said former decision, declares that a nonexistent

ground for a state decision is adequate to support it, and is adequate to justify the denial of appellants' federal rights.

The Supreme Court of Missouri likewise construed said statute, Section 922, R. S. Mo. 1939, in the same way this Court construed it, and held in *Beattie Mfg. Co.* v. *Gerardi*, 166 Mo. 142 (1901), l. c. 153:

> "It will be observed that no such ground of demurrer as that under consideration is authorized by the statute, and as it specifies the grounds upon which the defendant in an action may demur to the petition of his adversary under the well-known rule of the construction of statutes, that the mention of one or more things is exclusive of all others, it would seem that the question could not be raised by demurrer. The Code of New York specifies the grounds upon which a pleading may be demurred to and it was held by the Court of Appeals of that state, in the case of *Marie* v. *Garretson*, 83 N. Y. 14, that no pleading is demurrable unless it is subject to one or more of the objections specified in the provisions of the Code defining the grounds of the demurrer.

And at l. c. 155:

> "Section 598, Revised Statutes 1899, *supra*, specifies the grounds upon which a pleading may be demurred to, and nothing not specified in it can be a ground therefor."

And in *Purdy* v. *Pfaff*, 104 Mo. App. 331 (1904), l. c. 339:

> "Under the code the office of a demurrer is the same as it was at common law, it still is directed to the legal effect of the pleading for defects apparent on the face of the pleading, *but is confined in range to*

the statutory limits. Bliss, Code Pleading, Sec. 404; *Beattie Mfg. Co.* v. *Gerardi,* 166 Mo. 142."

It thus appears that the State Supreme Court and the state statute itself establish that the ground of misjoinder of parties plaintiff was not a ground of demurrer included in the statute. And yet the opinion herein declares that it was based

"upon a nonfederal ground adequate to support it,"

Under the law of the state of Missouri, the construction of said Section 922 by this Court in the year 1873, and the construction of said statute in the above cases, more than 40 years ago, by the Supreme Court of Missouri, expressly declaring that a demurrer could not be entertained to a pleading on a ground not included in the statute—by its readoption as a statute in the seven revisions of the Missouri statutes after the decision of this Court in the year 1873, and the four revisions of said statute after the above decisions by the Missouri appellate courts, operated to include the opinion of this Court construing said statute, and the opinions of the Supreme Court of Missouri as above quoted in said Section 922, as if they were written therein, and deprived the Missouri Supreme Court in this case of power or jurisdiction to decide the case in the state court on said ground, because it was not included in the statute. And the effect of revisions of the statute, as declared by the Supreme Court of Missouri *en banc,* was to deprive the Supreme Court of Missouri in Division 1 of jurisdiction or power to decide the case upon the ground of misjoinder of parties plaintiff, since said ground was not included in Section 922, R. S. Mo. 1939, and to make that a question which could be determined

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only by the legislature of Missouri by the enactment of a law including the ground of misjoinder of parties plaintiff as a ground of demurrer in that state.

Ex Parte Carey, 306 Mo. 287, l. c. 294.
Sanders v. *St. Louis & N. O. Anchor Line,* 97 Mo. 26, l. c. 30-31.
Kansas City Public Service Co. v. *Ranson,* 328 Mo. 524, l. c. 536.
Sutherland on Statutory Construction, 2d Ed., Sec. 403.
Georgia Railway & Electric Co. v. *City of Decatur,* 295 U. S. 165, l. c. 170.

The Missouri demurrer statute never did include the ground of misjoinder of parties.

All the text writers, and all the courts which have passed on the question presented by this motion for rehearing, in every state where the Code of Civil Procedure is adopted, have expressly decided that misjoinder of parties plaintiff is not a ground of demurrer in any state having such statute.

See:

Mader et al. v. *Plano Mfg. Co.,* 17 S. D. 553, 556, 97 N. W. 843.
Kyle v. *Craig,* 125 Cal. 107, l. c. 111, citing *Hentsch* v. *Porter,* 10 Cal., l. c. 558.
Applying the New York rule in *Caldwell* v. *Ruddy,* 1 P. 339 (Ida.) 340.
Reed v. *Higgins, Adm.,* 86 Ind. 143, 145.
Mayberry v. *Kelly,* 1 Kan. 116, l. c. 123.
Phoenix Bank v. *Donnell,* 40 N. Y. 410, l. c. 412-413.
Rusczck v. *Chicago, & N. W. Ry. Co.,* 210 N. W. 316.
Kucera v. *Kucera and Wife,* 86 Wis. 416.
Hanna v. *Brictson Mfg. Co.,* 62 F. (2d) 139, l. c. 144.

Aaron v. *Security Inv. Co.*, 211 N. W. 965, l. c. 967.
Virginia Hot Springs Co. v. *Hoover*, 130 S. E. 408, l. c. 409.
Gilbert v. *Glenn*, 156 S. E. 325, l. c. 333.
State ex rel. Kratche v. *Civil Court of Milwaukee County*, 191 N. W. 507, l. c. 508.
Wunderlich et al. v. *Chicago & N. W. Ry. Co.*, 66 N. W. 1144, l. c. 1145.
Dunn v. *Barnes, Adm'r*, 73 N. C. 273.
Smith et al. v. *Summerfield et al.*, 12 S. E. 997.
Ulness v. *Donnell et al.*, 237 N. W. 208 (N. D.).
Commercial & Savings Bank v. *Erdman*, 208 N W. 582, l. c. 583-584.
Hotchkiss v. *Ogle*, 153 Kan. 156, l. c. 162.
Parker v. *Simpson*, 180 Mass. 334, Syl. 2 and 9.

In Pomeroy's Code Remedies, Fifth Edition, page 214, note 89, discussing the identical Code provision, is the following, citing Missouri authority:

"'A misjoinder or uniting of parties who should not be joined cannot be taken advantage of by demurrer.' *Dolan* v. *Hubinger*, 109 Iowa, 408, 80 N. W. 514; *Cedar Rapids Nat. Bank* v. *Lavery*, 110 Iowa 575, 81 N. W. 775; *O'Neill* v. *Cunningham*, (Okla.) 244 Pac. 444; *Hot Springs Co.* v. *Hoover*, (Va.) 130 S. E. 408; *Dieterle* v. *Harris*, 66 Okla. 314, 169 Pac. 873; *Schmidt* v. *Wallinger*, 125 Va. 361, 99 S. E. 680; *Frankel* v. *Garrard*, 160 Ind. 209, 66 N. E. 687; *Commercial & Savings Bank* v. *Erdman*, 50 S. D. 97, 208 N. W. 582; *Mauldin* v. *Milford*, 127 S. C. 508, 121 S. E. 547; *Robinson* v. *Nelson*, 44 S. D. 281, 183 N. W. 874; *Canfield* v. *Newman*, (Tex. Civ. App.) 265 S. W. 1052; *Russell First Nat. Bank* v. *Knoll*, 7 Kan. App. 352, 52 Pac. 619; *Akins* v. *Hicks*, 109 Mo. App. 95, 83 S. W. 75; *Lancaster County* v. *State*, 74 Neb. 211, 104 N. W. 187, 107 N. W. 388; *Mader* v. *Plano Mfg. Co.*, 17 S. D. 553, 97 N. W. 843. A motion is the proper remedy. *Lull* v. *Anamosa Nat. Bank*, 110 Iowa 537, 81 N. W. 784; *Martin V. Clay*, 8 Okla., 46, 56

Pac. 715; *Hornish* v. *Ringen Stove Co.*, 116 Iowa 1, 89 N. W. 95; *Stiles* v. *City of Guthrie*, 3 Okla. 26, 41 Pac. 383; *Powell* v. *Banks*, 146 Mo. 620, 48 S. W. 664 (even after judgment)."

In every case in which a federal right was involved in the federal courts, those courts, construing and applying the Missouri Code of Civil Procedure, have held that misjoinder of parties plaintiff was not a ground for demurrer.

Magwire v. *Tyler*, 17 Wall. 253.
Armour v. *Roberts*, 151 Fed. 846.
Miller v. *Union Pacific R. R.*, 290 U. S. 227.
Hendon v. *Kurn*, 351 Mo. 980.
Butler v. *Lawson*, 72 Mo. 227.

Conclusion.

In *Baltimore & Ohio R. Co.* v. *Kepner*, 314 U. S. 44, at l. c. 52, it is said:

> "It is clear that the allowance or denial of this federal privilege is a matter of federal law, not a matter of state law under *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, 72. Its correct decision depends upon a construction of a federal act. Consequently, the action of a state court must be in accord with the federal statute and the federal rule as to its application, rather than state statute, rule or policy."

Since this case involves the Federal Civil Rights Acts, and their construction and application (Sections 43, 47 and 48, Title 8), as to whether or not they provide a single remedy for the loss caused by the same wrongful acts to the same person in every capacity in which injury or deprivation was sustained, the question involved is necessarily a federal question under the rule stated in *Cohens* v. *Virginia*, 6 Wheat., l. c. 379, when it said:

> "A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the Constitution or a law of the United States, whenever its correct decision depends upon the construction of either."

In the same case, at l. c. 404, it is said:

> "It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is to exercise our best judgment, and conscientiously to perform our duty. In doing this, on the present occasion, we find this tribunal invested with appellate jurisdiction in all cases arising under the Constitution and laws of the United States. We find no exception to this grant, and we cannot insert one."

The reason given for sustaining the motion to dismiss, in the light of the foregoing, is manifestly invalid, for this is a case which cannot be governed by the rules applied in the two cases cited by this Court in its per curiam opinion.

Neither of said cases was based upon any federal law. The right asserted was based upon the laws of the states mentioned in said opinions. In neither of said cases was any question involved concerning the question as to whether or not the same person could recover under a

federal law or the Civil Rights Acts for violation of the constitutional rights mentioned.

These circumstances make the second sentence of Clause 2, Section 2 of Article 3 of the Constitution operative in this case, for it appears that this is a case to which the judicial power extends, and it is not a case of original jurisdiction but one governed by the mandatory provision:

> "In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."

Section 237 of the Judicial Code discloses that Congress has made no exceptions or regulations excluding the appellate jurisdiction of this Court over this case. As to this case, the law, as declared by this Court in *Cohens* v. *Virginia,* was still the applicable law until October 14, 1946, on which date the decision of this Court dismissing the appeal herein either overruled or ignored the decision in *Cohens* v. *Virginia,* 6 Wheat. 264.

But we respectfully submit that it is not yet too late to correct this error, so that the ancient landmark fixed by said decision may not be obliterated.

We respectfully submit that this Court is without power or jurisdiction if *Cohens* v. *Virginia* be not overruled to decline jurisdiction in this case, and so appellants' motion for rehearing should be sustained, the record ordered printed, and the cause set down for argument; and, after a hearing thereof, the judgment of the Supreme Court of Missouri should be reversed.

Respectfully submitted,

A. E. Watson,
Martin J. O'Donnell,
Attorneys for Appellants.

Exhibit "A."

IN THE CIRCUIT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF TEXAS
AT SHERMAN

SALLIE C. WULF

vs. C. L. No. 111

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY

On this the 10th day of January, 1911, this cause coming on to be tried, all parties appeared in person and by attorney and announced ready for trial; whereupon came a good and lawful jury, to-wit: Tom E. Davis, Foreman, and eleven others, who were duly empaneled and sworn and who, after hearing the evidence, the argument of counsel and the charge of the court, retired to consider of their verdict; and after due deliberation returned into open court the following verdict, to-wit:

January 10, 1911.

TO THE HONORABLE CIRCUIT COURT FOR THE EASTERN DISTRICT OF TEXAS:

"We, the jury, in the case of Sallie C. Wulf against the M. K. & T. Railway Company find for Sallie C. Wulf, the plaintiff, a verdict for $7,000.00 cash money.

TOM E. DAVIS, Foreman."

It is therefore considered by the court and so ordered, adjudged and decreed that the plaintiff, Sallie C. Wulf, in her individual capacity and as administratrix of the estate of Fred S. Wulf, deceased, do have and recover of the defendant, the Missouri, Kansas and Texas Railway Company, a corporation, the sum of seven thousand ($7,000.00) dollars, together with interest thereon at the rate of 6 per cent per annum from this date, and all costs of suit

for which let execution issue. The amount recovered herein shall be for the sole use and benefit of said Sallie C. Wulf, and the payment to her of said seven thousand dollars, together with interest and costs as aforesaid, shall be a complete liquidation and settlement of said entire cause of action and shall acquit the defendant from further liability thereon.

(s) GORDON RUSSELL,
Judge

United States of America
Eastern District of Texas } ss:

I, Ruth B. Head, Clerk of the United States District Court in and for the Eastern District of Texas, do hereby certify that the annexed and foregoing is a true and full copy of the original JUDGMENT rendered in THE CIRCUIT COURT OF THE UNITED STATES, FOR THE EASTERN DISTRICT OF TEXAS, AT SHERMAN, in the case of

SALLIE C. WULF

vs. C. L. No. 111

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY

now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Sherman, Texas this 26th day of October, A. D. 1946.

(SEAL)

Ruth B. Head, RUTH B. HEAD,
Clerk.

UNITED STATES DISTRICT COURT

Eastern District of Texas

SALLIE C. WULF

vs.

MISSOURI, KANSAS & TEXAS RY. CO.

CERTIFIED COPY

JUDGMENT

BLEED THROUGH- POOR COPY